

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALLEN GREEN,

Defendants.

8:05CR288

ORDER

This matter is before the court regarding whether a certificate of appealability should issue in this case. On or about July 24, 2012, the court issued a dismissal order, Filing No. [178](#), denying defendant's motion to vacate pursuant to [28 U.S.C. § 2255](#). The court denied this motion on the basis that it constituted a successive petition, and that on initial review, defendant was not entitled to relief.

Before the defendant may appeal the denial of his § 2255 motion, a "Certificate of Appealability" must issue. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the right to appeal the denial of a § 2255 motion is governed by the certificate of appealability requirements of [28 U.S.C. § 2253\(c\)](#). [28 U.S.C. § 2253\(c\)\(2\)](#) provides that a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

. . . .

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

[28 U.S.C. § 2253\(c\)](#).

A “substantial showing of the denial of a federal right” requires a demonstration “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” [Slack v. McDaniel, 529 U.S. 473, 484 \(2000\)](#). In contrast, if the district court denies a § 2255 motion on procedural grounds without reaching the underlying constitutional claims on the merits, a certificate of appealability should issue under [28 U.S.C. § 2253\(c\)](#) when the defendant shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and would find it debatable whether the district court was correct in its procedural ruling. *Id.*

For the reasons set forth in the Memorandum and Order denying the defendant’s § 2255 motion (Filing No. [178](#)), I conclude that the defendant has not made a substantial showing of the denial of a constitutional right and has not shown that this court’s order was debatable or incorrect, as required by [28 U.S.C. § 2253\(c\)](#). Accordingly, a Certificate of Appealability is denied. However, [Fed. R. App. P. 22\(b\)](#) permits the defendant to request a Certificate of Appealability from the Court of Appeals.

THEREFORE, IT IS ORDERED:

1. That the defendant may proceed in forma pauperis on appeal as set forth in Filing No. [181](#);

2. That no Certificate of Appealability will issue; and
3. That the Clerk of Court shall process this appeal to the Eighth Circuit.

Dated this 29th day of August, 2012.

BY THE COURT:

s/ Joseph F. Bataillon

United States District Judge

*This opinion may contain hyperlinks to other documents or Web sites. The U.S. District Court for the District of Nebraska does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide on their Web sites. Likewise, the court has no agreements with any of these third parties or their Web sites. The court accepts no responsibility for the availability or functionality of any hyperlink. Thus, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the opinion of the court.